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No. 87

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD AND GENERAL ELECTRIC CO., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ABRAMSON
1126 16th Street, N.W.
Washington, D. C.
Attorneys for Petitioner.

BENJAMIN C. SIGAL,
Of Counsel.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, IUE-AFL-CIO, prays that a writ of certiorari issue to review final orders of the United States Court of Appeals for the 2nd Circuit which (1) dismissed a petition for review filed by IUE-AFL-CIO, hereinafter sometimes

called the Union, and (2) denied the petitioner leave to intervene in an enforcement proceeding filed by the National Labor Relations Board, Respondent.

OPINION BELOW

The decision and order of the National Labor Relations Board is reported at 150 NLRB No. 36. The Court below dismissed the Union's petition for review, and denied it leave to intervene in the Board's enforcement proceedings, on April 1, 1965, without opinion in either action.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

When the National Labor Relations Board upholds, in part, a union's unfair labor practice charges against an employer, after proceedings in which the union actively participates as a party, but the union believes that the Board has improperly failed to find certain violations of the National Labor Relations Act, as amended, and that the order of the Board fails to provide a satisfactory remedy, may the union (a) be denied review of the order of the Board, and (b) be denied intervention in enforcement proceedings brought by the Board wherein it will be determined how extensively the employer has violated federal law and what the scope of the remedy should be.

STATUTE INVOLVED

29 U.S.C. §160(f) provides, in part,

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides

> or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside . . . (T)he court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; . . ."

STATEMENT

On January 18, 1965, this Court granted certiorari in *International Union v. Scofield, et al.* No. 650, October Term 1964, to review the question whether the successful *defending party* below the Board may be denied intervention in the judicial review proceeding brought by the charging party.

On March 29, 1965, this Court granted certiorari in *International Union v. Fafnir Bearing Co. et al,* No. 883, October Term 1964, to review the question whether the successful *charging party* before the Board may be denied intervention in the judicial review proceeding brought by the defending party.

Certiorari is sought in this case on 2 related questions: (a) whether the *charging party,* which was in part, but not entirely, successful before the Board, may be denied review of the final order of the Board despite the fact the Board denied part of the relief which that party had sought; and (b) whether the same charging party may be denied intervention in the enforcement proceeding brought by the Board, against the charged party, based on the same order of the Board.

On the basis of charges filed by the Union alleging that the General Electric Co. had violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), 158(a)(3) and 158 (a)(5), by refusing to bargain in good faith and refusing to reinstate certain striking employees on request, the General Counsel of the Board issued a complaint against the Company. Pursuant to Section 102.8, Subpart A, of the Board's Rules and Regulations, the Union was a party to all subsequent Board proceedings, and participated on a parity with the Company and the Board's General Counsel.

On April 1, 1963, the Trial Examiner found the Company had violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act, and recommended issuance of an order against the Company. He failed, however, to make certain requested findings of violations, and failed to include a number of provisions in the proposed order which the Union had requested. Oral argument on exceptions filed by the Union, Company, and General Counsel was heard by the full Board on May 7, 1964.

On December 16, 1964, the Board issued its Decision and Order, in which the Board adopted the Intermediate Report and Recommended Order of the Trial Examiner and rejected all the Union's exceptions to the Report. To obtain review of these matters, the Union filed a petition to review the Board's Order in the United States Court of Appeals for the District of Columbia Circuit on December 16, 1964. The Board *admitted,* in its Answer to that petition, that the Union is an aggrieved person within the meaning of Section 10(f) of the Act. The Company did not move to intervene in that proceeding to seek dismissal of the Union's petition for review.

The Company filed a petition for review of the Board's

Order in the United States Court of Appeals for the Seventh Circuit on December 16, 1964. That Court transferred the Company's petition to the Court below on February 18, 1965. On March 12, 1965, pursuant to a motion to transfer filed by the Board in the United States Court of Appeals for the District of Columbia Circuit, that Court transferred the Union's petition for review to the Court below.

On February 15, 1965, the Board filed in the Court below a petition for enforcement of its Order against the Company, and subsequently moved for consolidation therewith the Union and Company petitions for review.

On March 18, 1965, the Union filed in the Court below a Motion for Leave to Intervene in the Board's Petition for Enforcement to which was attached a copy of the Union's exceptions to the Trial Examiner's Intermediate Report.

The Board, in its Response to the Union's motion, dated March 25, 1965, *consented* to the intervention, contrary to its usual practice. e.g. *International Union v. Fafnir, supra.*

The Company opposed the Union's motion, and also moved for dismissal of the Union's petition for review.

The Court below denied the Union's motion for leave to intervene, with leave to file a brief *amicus* at the time the Company filed its brief, and also dismissed the Union's petition for review because it was not an aggrieved party. Both actions were taken without opinion. The Court below consequently permitted consolidation of the Board's petition for enforcement only with the Company's petition for review.

Certiorari is sought to resolve important federal questions closely related to the issues pending before this Court in *International Union v. Scofield, supra,* and *International*

Union v. Fafnir, supra, and involving conflicting administration of justice in federal courts.

REASONS FOR GRANTING THE WRIT

This case presents 2 important issues relating to the orderly administration of justice in the federal courts:

(a) The important issue of whether a charging party, claiming to be aggrieved by a final order of the Board denying in part the relief sought, and whose aggrievement is admitted by the Board, may be denied judicial review of the proceeding.

(b) The recurrent and important intervention issue similar to the issue pending in *International Union v. Fafnir* No. 883, certiorari granted March 29, 1965.

1. *Closely Related Issues Pending.*

In *Fafnir* the question is whether the charging party before the Board may be denied intervention in the judicial review of the Board's decision sought by the defending party. In the present case, one question is whether the charging party before the Board may be denied intervention in the Board's petition for enforcement. There are two additional factors present, namely (a) the charging party contends that there should be additional findings of violations of the Act by the Company, and that the Board's order should be modified in specified details in order to effectuate the policy of the Act; (b) that the Board has consented to intervention by the charging party.

In *International Union v. Scofield, supra,* certiorari granted January 18, 1965, the question presented is whether a *charged party* before the Board may be denied intervention in the judicial review of the Board's decision.

The second question presented by this case is whether a *charging party* may seek review of a Board decision when

it claims that *part* of the relief it has requested has been denied by the Board, and the Board admits that the charging party is an aggrieved person.

This Court has deemed appropriate its concurrent review of closely related questions. *Brown v. Board of Education* 344 U.S. 1, 3; *Local Union No. 189 v. Jewel Tea Co.*, 379 U.S. 813.

2. *Important Questions Presented*

(a) The right of a charging party to seek judicial review of a Board order, as a "person aggrieved" within the meaning of Section 10(f) of the Act, if the Board refuses any of the relief requested by the charging party, has rarely heretofore been successfully challenged. *Albrecht v. NLRB*, 181 F.2d 652 (C.A. 7, 1950). Although a great number of petitions for review have been filed by charging parties complaining of partial denial of relief sought, e.g. *Local 833, UAW v. NLRB*, 300 F.2d 699 (C.A.D.C. 1962), our research has failed to discover a single instance, prior to the action of the Court below, in which such petitions for review have been dismissed on motion on the ground that the charging party was not a person aggrieved.

(b) While most circuit courts have denied *intervention* by the charging party in judicial review of a Board decision, several circuit courts have allowed it. See e.g. *Local 761, IUE v. NLRB*, 278 F.2d 282 (C.A.D.C. 1960); *Kearney & Trecker Corp. v. NLRB*, 210 F.2d 852 (C.A. 7, 1954); *Donnelly Garment Co. v. NLRB*, 151 F.2d 854 (C.A. 8, 1945).

The questions here presented are of no less importance to the orderly administration of justice in federal courts than the questions this Court has agreed to review in No. 650 and No. 883, October Term, 1964. The need for such orderly administration fully warants this Court's review.

See *Western Pacific R.R. Corp. v. Western Pacific R.R. Co.* 345 U.S. 247, 260.

3. *Intent of the Act is frustrated.*

(a) In denying the Union a right to review of the Board's decision, to the extent that the Board denied the relief which the Union sought, the Court below frustrated the intent of Congress and ignored prior decisions of this Court.

Section 10(f) of the Act is explicit in providing that "*Any* person aggrieved by a final order of the Board granting or *denying* in whole or *in part* the relief sought may obtain a review of such order . . ." (Emphasis added.) There is no limitation with respect to how large a part of the relief sought must be denied, or the nature of the part denied. For example, in *Perfection Mattress & Spring Co. v. NLRB* per curiam interim order of May 4, 1961, reported at 48 LRRM 2167 (C.A. 5), decision on merits at 321 F.2d 612, the petitioner, the charging party in the Board proceedings, sought only a more detailed order describing the acts of picketing to be prohibited, which the Board denied. That court held that such denial of relief expressly sought by the petitioner made it an aggrieved person within the contemplation of the law, and denied the motion to dismiss. In the present case, the charging parties request for a more specific order by the Board was only part of the relief requested, and denied.

To the extent that the Union, in its petition for review, seeks a modification of the Board's order, it desires an opportunity to *contest* the Board's order, not to *enforce* it. Cf. *Amalgamated Workers v. Consolidated Edison Co.*, 309 U.S. 261, 266 (1940); *American Newspaper Publishers*

Ass'n v. NLRB, 345 U.S. 100 (1953); *Albrecht v. NLRB*, *supra*.

It is evident that the Union in this case, in filing its petition for review, is only seeking to follow the procedure which both this Court, and the circuit courts, have indicated is provided to it by Section 10(f) of the Act. In view of the explicit language of that Section, denial of the Union's right of review is a clear violation of the Act.

The assertion of the Court below that the Union was not aggrieved is incomprehensible. Since no opinion was written, it must be assumed that the Court below accepted all or part of the assertions made in the Company's motion to dismiss with respect to the Union's aggrievement. The Company contends that the Union complains about the form, not the substance, of the Board's order, and is, therefore, not aggrieved. Even a casual examination of the Union's exceptions to the Trial Examiner's Recommended Order, which was adopted without change by the Board, reveals that the Company's claim is a gross misrepresentation. The Union complains specifically about the failure of the Board to find certain conduct of the Company violative of the Act, and also complains about the inadequacy of the Board's orders in specific respects. A summary of the principal items of relief requested by the Union, and denied by the Board (see Charging Party's Exceptions to Intermediate Report, attached to Motion to Intervene) is as follows:

1. That the Company's conduct at the bargaining table, as well as its communications program and related conduct away from the bargaining table in connection with the negotiations, when taken separately, each support a finding that the Company refused to bargain in good faith, in violation of the Act;

2. That the recommended order of the Trial Examiner, adopted by the Board, was inadequate and deficient in that it failed to order the Company to cease and desist from refusing to bargain

(a) by refusing to make every reasonable effort to reconcile the difference between it and the Union;

(b) by proposing changes in employee benefits on a take-it-or-leave-it basis during the term of a national collective bargaining agreement, and refusing to negotiate with respect to such proposed changes;

(c) by intervening in, and attempting to influence the conduct of, votes relating to negotiations, and other internal affairs of the Union, and calculated to undermine the Union's status as collective bargaining representative;

(d) by communicating directly with its employees, with respect to wages, hours, and other terms and conditions of employment, and discussing pending contract proposals with them, in a way calculated to undermine the Union and derogate from its status as collective bargaining representative;

(e) by threatening loss of employment, and otherwise coercing its employees, to induce them to withdraw their support of the Union's contract proposals and to support its own contract proposals, and threatening its employees with loss of employment and otherwise coercing them unless they abandon strike activity; and

(f) by soliciting and promising benefits to strikers to procure their abandonment of their concerted activities and return to work.

Moreover, even if the Union requested no more than an order which spelled out prohibited conduct more clearly than the present order, denial of that request would constitute aggrievement, *Perfection Mattress & Spring Co. v. NLRB, supra.*

b. On the right of the charging party to intervention in the Board's proceeding for enforcement, there appears no need for further argument to support this aspect of this petition for certiorari, in view of the Court's grant of certiorari in *International Union v. Fafnir Bearing Co., supra.*

CONCLUSION

It is submitted that the writ should be granted.

Respectfully submitted,

IRVING ABRAMSON
1126 16th Street, N.W.
Washington, D. C.
Attorneys for Petitioner.

BENJAMIN C. SIGAL,
Of Counsel.

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